SUPREME COURT OF THE UNITED STATES.

No. ~~224~~ 105.

WILLIAM E. BANKS, PLAINTIFF IN ERROR,

vs.

WILLIAM B. OGDEN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF ILLINOIS.

GOVERNMENT PRINTING OFFICE.

391

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1 Pleas in the circuit court of the United States for the northern district of Illinois, before the honorable Thomas Drummond, judge of the district court for the district aforesaid, and on Tuesday, the eighteenth day of November, in the year of our Lord one thousand eight hundred and sixty-two, and of the independence of the United States the eighty-seventh year.

WM. H. BRADLEY, *Cl'k.*

WILLIAM E. BANKS
v.
WILLIAM B. OGDEN. } Ejectment.

Be it remembered that on the twenty-fifth day of January, in the year of our Lord one thousand eight hundred and fifty-nine, said plaintiff, by Beckwith and Le Moyne, his attorneys, came into the clerk's office of the circuit court of the United States for the northern district of Illinois and filed his bond for costs, together with a
2 declaration in ejectment notice and service thereof, all of which read in the words and figures following, to wit:

Bond for costs.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

WILLIAM E. BANKS
v.
WIILLAM B. OGDEN. } Circuit court, December term, A. D. 1859.

I enter myself security for costs in this cause, and promise to pay all costs which may accrue to the opposite party in this action, or to any of the officers of this court, and in default of payment by the plaintiff of any costs ordered or adjudged to be paid by him, hereby agree and stipulate that execution may issue against my property for any costs taxed against him.

Dated this 25th day of January, A. D. 1859.

J. V. LE MOYNE.

3 Endorsed: Filed Jan'y 25, 1859.

WM. H. BRADLEY, *Cl'k.*

Declaration and notice.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

UNITED STATES CIRCUIT COURT, *December Term, A. D.*, 1859.

William E. Banks, who is a citizen of the State of Connecticut, by J. V. Le Moyne, attorney, complains of William B. Ogden, who is a

citizen of the State of Illinois, in a plea of trespass and ejectment. For that, whereas heretofore, to wit, on the first day of July, in the year eighteen hundred and fifty-seven, A. D. 1857, at and within the county of Cook and said State of Illinois, the said plaintiff was possessed as of his demesne in fee simple of a certain tract or parcel of land with the appurtenances, situate in Kinzie's addition to the city of Chicago, in the county of Cook, in the said State of Illinois, and described as follows, to wit: bounded on the south by the
4 north line of Superior street; on the west by the east line of said street; on the north by a line running parallel with the north line of Superior street, and one hundred feet north of said line of said street; and on the east by the shore of Lake Michigan, being east of and opposite to block fifty-four, (54,) in Kinzie's addition to said city of Chicago, which said premises exceed in value the sum of five hundred dollars, and which the said plaintiff claims in fee simple. And the said plaintiff, being so possessed thereof, the said defendant afterwards, to wit, on the same day and year last aforesaid, entered into the said premises and ejected the said plaintiff therefrom, and from the time last aforesaid has unlawfully withheld, and does now unlawfully withhold from the said plaintiff the possession thereof, to the damage of the said plaintiff of the sum of five hundred dollars, and therefore he brings suit, &c.

J. V. LE MOYNE,
C. BECKWITH,
Att'ys for Plaintiff.

5 To WILLIAM B. OGDEN:

The above-named defendant, you are hereby notified that the declaration, with a copy of which you are now herewith served, and to which this notice is attached, will be filed in the circuit court of the United States for the northern district of Illinois, on the 25th day of January, A. D. 1859, and that upon filing the same a rule will be entered requiring you to appear and plead to the said declaration within twenty days after the entry of said rule, and that if you neglect so to appear and plead a judgment by default will be entered against you, and the plaintiff will recover possession of the premises specified in said declaration.

Dated this 25th day of January, A. D. 1859.

J. V. LE MOYNE,
C. BECKWITH,
Att'ys for Plaintiff.

Service of a copy of the within declaration and notice is admitted, Chicago, Jan'y 25, 1859.

W. B. OGDEN,
By E. B. McCAGG, *his Att'y.*

6 Endorsed: Filed Jan'y 25, 1859.

WM. H. BRADLEY, *Cl'k.*

And afterwards, to wit, on the 29th day of January, A. D. 1859, in the record of the proceedings of said court in said cause, is the following entry, to wit:

WILLIAM E. BANKS
v.
WILLIAM B. OGDEN. } Ejectment.

Now comes the plaintiff, by Beckwith & Le Moyne, his attorneys, and files his declaration in ejectment against the defendant, together with a notice thereto attached, and also an acknowledgment of due service *of due service* of a copy of said declaration and notice upon the defendant, and on their motion it is ordered by the court that this cause be docketed and that the defendant be ruled to plead within twenty days, or that his default be entered.

And afterwards, to wit, on the 14th day of February, A. D. 1869, the said defendant, by his attorneys, Scammon, McCagg and
7 Fuller, comes and files his plea herein, in the words and figures following, to wit:

Defendant's plea.

UNITED STATES CIRCUIT COURT,
Northern District of Illinois, December Term, A. D. 1858.

WILLIAM B. OGDEN
ads.
WILLIAM E. BANKS. } Ejectment.

And the said William B. Ogden, by Scammon, McCagg & Fuller, his attorneys, comes and defends the force and injury when, &c., and says that he is not guilty of the said supposed trespass and ejectment above laid to his charge, or of any part thereof, in manner and form as the said William E. Banks hath above thereof complained against him, and of this he, the said William B. Ogden, puts himself upon the country, &c.

SCAMMON, McCAGG & FULLER,
Def'ts Att'ys.

8 Endorsed: Filed Feb. 14, 1859.
WM. H. BRADLEY, *Cl'k.*

And afterwards, to wit, on the 11th day of April, A. D. 1860, in the record of the proceedings of said court in said cause is the following entry, to wit:

WILLIAM E. BANKS
v.
WILLIAM B. OGDEN. } Ejectment.

Now comes the plaintiff, by Messrs. Le Moyne & Wills, and now comes also the defendant, by Messrs. Scammon, McCagg & Fuller, his attorneys, and upon issue joined thereupon come a jury of good and

lawful men, to wit: W. H. Fay, Edward Hoffman, John Shean, Alonzo Hamlin, Samuel Waugh, Charles Patten, William V. Plum, A. J. Cronise, Isaac Delano, Samuel Thomas, jr., Chester D. Bartlett, Samuel McFadden, who were duly elected, tried and sworn to well and truly try said issue, and after hearing a part of the evidence, the hour of adjournment having arrived, the further hearing is postponed until to-morrow morning.

9 And afterwards, to wit, on the 12th day of April, A. D. 1860, in the record of the proceedings of said court in said cause is the following entry, to wit:

WILLIAM E. BANKS
v.
WILLIAM B. OGDEN. } Ejectment.

Now come again the parties, by their attorneys, and now come also the jury heretofore empannelled and sworn in this cause, and after further progress in the trial without concluding the same, the further hearing is postponed until to-morrow morning.

And afterwards, to wit, on the 13th day of April, A. D. 1860, in the record of the proceedings of said court in said cause is the following entry, to wit:

WILLIAM E. BANKS
v.
WILLIAM B. OGDEN. } Ejectment.

Now come again the parties, by their attorneys, and now come the jury heretofore empannelled in this cause, and after hear-
10 ing the concluding evidence and arguments of counsel and receiving instructions from the court, the jury returned into court the following verdict, to wit: We, the jury, find the defendant is not guilty of unlawfully withholding the premises claimed by the plaintiff, as alleged in the declaration.

And afterwards, to wit, on the 8th day of October, A. D. 1861, in the record of the proceedings of said court in said cause is the following entry, to wit:

WILLIAM E. BANKS
v.
WILLIAM B. OGDEN. } Ejectment.

Now comes the plaintiff, by his attorneys, and on motion to set aside the finding of the jury in this behalf and for a new trial, and the court having fully considered said motion, and being now advised thereon, sustains said motion, and set aside the finding of the jury in this behalf, and grants a new trial of said cause.

11 And afterwards, to wit, on the 5th day of December, A. D. 1861, in the record of the proceedings of said court in said cause is the following entry, to wit:

WILLIAM E. BANKS
v.
WILLIAM B. OGDEN. } Ejectment.

Now come the parties, by their attorneys, and upon issue joined come a jury of good and lawful men, to wit: Cornelius Price, John Paul, David Bloom, Elias Benner, O. M. Brewster, John J. Buckly, Jacob Portman, Michael Burns, P. Jacobs, William Moore, E. B. Kingsley, and A. L. Telford, who are all duly elected, tried and sworn to well and truly try said issue; after hearing the evidence and arguments of counsel, and the instructions of the court, the jury returned into court the following verdict: We, the jury, find the defendant not guilty. and thereupon the plaintiff moves the court to set aside the finding of the jury and grant a new trial.

12 And afterwards, to wit, on the 18th day of November, A. D. 1862, in the record of the proceedings of said said court in said cause, is the following entry, to wit:

WILLIAM E. BANKS
v.
WILLIAM B. OGDEN. } Ejectment.

The court having considered, and being now fully advised on the motion of the plaintiff for a new trial, overrules the same.

It is thereupon considered and adjudged by the court that the defendant is not guilty, and that he go hence without day, and that he have and recover of the plaintiff his costs and charges herein, and that execution issue therefor.

13 And afterwards, to wit, on the 5th day of November, A. D. 1862, the following bill of exceptions taken on the trial of said cause was filed in this behalf, to wit:

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In the circuit court of the United States for the northern district of Illinois.—October term, A. D. 1862.

WILLIAM E. BANKS
v.
WILLIAM B. OGDEN. } Ejectment.

We hereby agree to the foregoing bill of exceptions in the above-entitled cause, as containing a statement of the facts upon which the controversy turned.

J. V. LE MOYNE, *Att'y for Plaintiff.*
SCAMMON, McCAGG & FULLER,
Att'ys for Def'ts.

Robert A. Kinzie was the patentee of the north fraction of section ten, (10,) township thirty-nine, (39,) range fourteen, (14,) which he subdivided and made a plat, naming the subdivision "Kinzie's Addition."

14 This plat was filed for record in the recorder's office of Cook county, Illinois, February 22d, 1833, but was not absolutely recorded or spread on the records until February, 1834.

The plaintiff and defendant both claim title from Robert A. Kinzie.

February 26th, 1833, Robert A. Kinzie executed a deed to Ellen M. Woolcott, which was recorded in the recorder's office of Cook county, Illinois, May 22d, 1833, conveying, among other lots and blocks, block number fifty-four (54) in Kinzie's addition. The description in the deed is as follows:

"All the right, title, claim and interest of him the said Robert A. Kinzie, in and to the following described lots or parcels of land, situate, &c., in Cook county, Illinois, and in Kinzie's addition to the town of Chicago, and known and designated in the plan of said addition to the said town of Chicago as follows, viz: lots numbered ***** and whole blocks numbered ***** and 54, all of which may be seen by reference to the plan of said addition. To have and to

15 hold, &c., with all and singular the rights, privileges and appurtenances, rents, issues and profits, remainder and reversion unto the same belonging."

The defendant deduces title from Mrs. Woolcot to the southeast part of block 54, having a front on Sand street of one hundred feet.

Robert A. Kinzie became a bankrupt in 1842.

In March, 1857, the general assignee files a petition in the United States district court of Illinois, for an order to sell certain real property discovered since former sales, which property is described in his petition, and includes the lot in question.

An order of sale is made by the court, and the property sold for five thousand dollars to Samuel F. Sutherland, the grantor of the p'a'ntiff.

Sale reported, &c.

There is no controversy about the regularity of the proceedings by the assignee, but the defendant insisted that the assignee in

16 bankruptcy of Kinzie was barred by the 8th section of the bankrupt act of 1841 from making any sale or conveyance of this property after the lapse of two years from date of the decree in bankruptcy, and on that ground objected to the introduction in evidence of all of plaintiff's title derived from these proceedings; and the defendant objected generally that Kinzie's assignee had no title to the "locus in quo," and that no title passed to Sutherland.

It is agreed that the annexed plat correctly represents the position of the premises for which this suit is brought.

The lot sued for is enclosed with a double red line, and is one hundred feet in width by about two hundred feet deep from Sand street to the water. All the red lines upon the plat are drawn east of what was the lake shore line at the time the plat of Kinzie's addition was made, and at the time of Kinzie's conveyance to Mrs. Woolcott.

It is admitted that the east line of block 54, running from Superior street north until it struck the water, in February, 1833, the time the plat was made and filed for record, was not less than one
17 hundred feet; and that the length of the line east from the southeast corner of the block to the water was at that time less than half the width of the street, (that is, less than 33 feet.) The point where the east line of block 54 struck the water is marked upon the annexed plat "A."

The part of Sand street which at the time of making the plat extended between block 54 and the water line is marked with a dotted line; the continuous lines are the lines as they appear in the original map of Kinzie's addition.

William Lill, being called, deposes as follows:

That he had lived on block 54 for 23 years, and was well acquainted with the premises; that the accretion began to form on the lake shore north of the north pier, at the Chicago river, about 1841 or 1842, beginning to form first down near the pier and extending gradually north. There was not much accretion till the years 1844 or 1845. The storms affected the lake shore line, and some
18 years the whole accretion was washed away. Twenty-two years ago, I think, the water came up on to lot 12 of the subdivision of said block 54, (which lot 12 is that part of block 54 above referred to as belonging to the defendant.) The accretion now made out is over 200 feet east of the east line of block 54.

It was agreed that the property in question exceeds two thousand dollars in value.

Thereupon the court instructed the jury, upon the foregoing agreed statement of facts, that the law was for the defendant; to which instruction the plaintiff then and there excepted.

And because the said exception so made to the instruction of the judge of the said court, and none of the several matters aforesaid, do appear upon the record of the said trial, therefore, on the prayer of the said plaintiff by his counsel, the said judge has to this bill of exceptions put his seal, according to the statute in such case made and provided, this day of , in the year one thousand eight hundred and sixty-two.

19 THOMAS DRUMMOND. [SEAL.]

Endorsed: Filed Nov. 18, 1862.

WM. H. BRADLEY, *Cl'k.*

(Here follows map, page 20.)

And afterwards, to wit, on the 12th day of December, A.
21 D. 1862, the said plaintiff, by his attorneys, sued out a writ of error in the words and figures following, to wit:

Writ of error.

UNITED STATES OF AMERICA,
Northern district of Illinois, ss:

The United States of America to the judges of the circuit court of the United States for the northern district of Illinois, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said court before you, wherein William E. Banks is the plaintiff and William B. Ogden is the defendant, a manifest error hath happened, to the great damage of the said William E. Banks, plaintiff, as by his complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the
22 Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Hon. Roger B. Taney, Chief Justice of the Supreme Court of the United States, this twelfth day of Dec., in the
[SEAL.] year of our Lord one thousand eight hundred and sixty-two, and of our independence the 87th year.

WM. H. BRADLEY, *Clk.*

Endorsed: Filed Dec. 12, 1862.

WM. H. BRADLEY, *Clk.*

And afterwards, to wit, on the 12th day of December, A.
23 D. 1862, the defendant filed his appeal bond in the words and figures following, to wit:

Appeal bond.

In error to the United States circuit court for the northern district of Illinois.

WILLIAM E. BANKS
v.
WILLIAM B. OGDEN. } October term, A. D. 1862.

Know all men by these presents, that we, William E. Banks and James F. Lord, are held and firmly bound unto the above-named William B. Ogden in the sum of five hundred dollars, to be paid to he said William B. Ogden, and to his executors or administrators; o which payment, well and truly to be made, we bind ourselves and

each of us, our heirs, executors, and administrators, firmly by these presents. Sealed with our seals, dated this twenty-eighth day of November, A. D. 1862. The condition of this obligation is such, that whereas the above-named William E. Banks has prosecuted a
24 writ of error to the Supreme Court of the United States to reverse the judgment rendered by said circuit court in the above entitled cause in favor of said William B. Ogden:

Now, therefore, the condition of this obligation is such, that if the above-named William E. Banks shall prosecute his said writ of error to effect, and shall pay all costs if he shall fail to make good his plea, then this obligation to be void; otherwise the same shall be and remain in full force and virtue.

WILLIAM E. BANKS, [SEAL.]
By J. V. LE MOYNE.
JAMES T. LORD. [SEAL.]

Endorsed: Approved.

THOMAS DRUMMOND.

Filed Dec. 12, 1862.

WM. H. BRADLEY, *Cl'k.*

25 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for the northern district of Illinois, do hereby certify the foregoing to be a true, full, and complete transcript of the record and proceedings had in said court in the cause wherein William E. Banks was plaintiff, and William B. Ogden is defendant, as the same appears from the records of said court now remaining on file in said court.

In testimony whereof, I have hereunto set my hand and affixed the [SEAL.] seal of said court at office in Chicago, this 24th day of December, A. D. 1862, and of our independence the 87th year.

WM. H. BRADLEY, *Clerk.*

Filed 2d January, 1863.

ADDITIONAL RECORD.

In circuit court United States, northern district of Illinois.

Of the December term, A. D. 1863.

WILLIAM E. BANKS
vs.
WILLIAM B. OGDEN. } Ejectment.

Be it remembered that on the nineteenth day of January, A. D. on thousand eight hundred and sixty-four, being one of the days of th December term of the circuit court of the United States for th northern district of Illinois, came the parties, by their attorneys, an filed in open court the following stipulation, to wit:

In the Supreme Court of the United States.

WILLIAM E. BANKS, plaintiff in error,
vs.
WILLIAM B. OGDEN.

In error to the circuit court of the United States for the northe district of Illinois.

It is hereby stipulated and agreed, by and between the undersigne counsel for the plaintiff and defendant in the above-entitled caus that inasmuch as certain omissions have been discovered in the b of exceptions and record filed in said cause, that said bill of exceptio shall, with the permission of the court, be amended by inserting the in a copy of the original map of Kinzie's addition to the original to of Chicago. And it is agreed that the copy of the said map, hereto tached, shall be deemed and taken to be a true copy of said origi map, and shall be used on the hearing of the said cause with the sa effect as if the same or the said original map had been inserted said bill of exceptions and formed part of the record in said cau and the issuing of a citation is hereby waived. It is further agr that this stipulation, together with the said copy of the said m shall be certified to said Supreme Court by the clerk of the cir court of the United States for the northern district of Illinois, s to become a part of the record of the said cause, with the same fo and effect as if a diminution of the record had been suggested in said Supreme Court.

It is further stipulated and agreed that this stipulation is m subject to the right of the defendant in error to produce the orig map of Kinzie's addition (of which the annexed map is supposed be a true copy) on the trial of this cause in this court, and if variance shall appear to exist between the copy and the original,

the latter shall control the former, and be considered the true map of said addition.

Chicago, Jan'y 9, 1864.

SAM'L W. FULLER,
For Def't in Error.
J. V. LE MOYNE,
Att'y for Pl'ff.

Endorsed: Filed Jan. 19, 1864.

WM. H. BRADLEY, *Clerk.*

[Here follows map.]

NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for the northern district of Illinois, do hereby certify the foregoing to be a true copy of the stipulation and map of Kinzie's addition to Chicago therein referred, filed in the cause wherein William B. Banks was plaintiff, and William B. Ogden defendant, as the same appears from the original thereof, now on file in said cause, and remaining in my custody.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at office, in Chicago, this 22d day of January, A. D. 1864, and of our independence the 88th year.

SEAL.]

WM. H. BRADLEY, *Cl'k.*

Filed January 29, 1864.

In the Supreme Court of the United States.

DECEMBER TERM, 1864.

No. 105.

WILLIAM E. BANKS, PLAINTIFF IN ERROR,

vs.

WILLIAM B. OGDEN, DEFENDANT IN ERROR.

In Error to the Circuit Court of the United States for the District of Illinois.

STATEMENT OF THE CASE.

This is an action of ejectment, brought originally by Banks, the plaintiff below, (who is also plaintiff in error,) against the defendant, Ogden, to recover part of an accretion formed by the action of the waters of Lake Michigan, in front of that part of Sand street which lies east of lot No. 12, in block 54, of Kinzie's addition to Chicago. Lot No. 12 forms the southeast corner of that block, and is *bounded east by Sand street.* The accretion, of which the land in controversy forms a part, lies north of the north pier of the harbor of Chicago, and was caused by the erection and extension of that pier eastward into the lake; and at the point named has been formed since the year 1842. Printed Record, p. 7.

The *general* locality of the land in dispute will be seen by reference to the map of Kinzie's addition to Chicago; but its *particular* locality and dimensions will be seen by reference to the diagram of the premises—both of which form parts of the record. It will be observed that it lies *east of the east line of Sand street, when extended north, with full width,* through the accretion formed since the laying out of Kinzie's addition in February, 1833. It will also be observed that *Kinzie had no intention,* as appears by the plat of Kinzie's addition, *to lay out any street or public landing on the lake shore:* that Sand street was *the most easterly street* laid down on the said plat; that it ran north and south, *having blocks of land lying along its whole course, between its eastern line and the waters of the lake;* that it touched the lake only at its northern terminus, where it struck the lake *obliquely,* in consequence of the indentation in its shore at that point; and that,

with diminishing width, it tapered to a point in front of block 54, without any intention on Kinzie's part of its ever being wider there than the map actually shows.

The defendant and the other owners of block 54 have closed up the mouth of Sand street north of Superior street, and are now in possession of all the land lying *east* of the *west* line of Sand street, both as originally laid out, and as produced northward in the diagram. This fact, although not stated in the record, will not be denied by the defendant's counsel.

The legal aspect of the case is this: Both parties claim the accretion by *record title* under Robert A. Kinzie, the original patentee of the land from the United States, and the founder of that part of the city of Chicago known as Kinzie's addition; but they claim it by *different record titles* derived from him. *No claim to the land is made by the city of Chicago*, nor is any other title to it set up by either party than that arising from their respective paper titles. The chain of title by which each party claims the land from Robert A. Kinzie, their common source of title, is set forth in the Bill of Exceptions.

Without repeating here the particulars of each title, it may be stated generally, that the accretion is claimed by the defendant, Ogden, as an *incident* to his ownership of lot No. 12, in block 54, *which lot is there bounded east by Sand street;* that his title to lot No. 12 constitutes him a *riparian proprietor*, notwithstanding the fact that his lot is separated from the lake by Sand street, because, as he alleges, the grant of that lot carried with it, by operation of law, the title to the fee of Sand street at that point, eastward to the water's edge. In other words, he claims title to the accretion as an *incident to an incident to lot No.* 12. This title is denied by the plaintiff on the grounds that the defendant is *not a riparian proprietor*, because his lot is bounded eastward by Sand street; that he has no title to the fee of *any part* of Sand street; or that if he *has*, the most he can claim is title to the *one-half of the original width* of the street at that point, or at most, since the accretion, to *the one-half of the full width* of Sand street opposite his lot.

On the other hand, the plaintiff claims this accretion by a direct purchase and conveyance of it by the assignee in bankruptcy of Robert A. Kinzie, whose title was sold and conveyed by his assignee in 1857 to Samuel F. Sutherland, the plaintiff's grantor, for the sum of $5,000 in gold, paid to the assignee in bankruptcy for the benefit of Kinzie's creditors.

As the basis of his claim, the plaintiff contends, generally, that the *original title of Kinzie* to the fee of Sand street in front of block 54 *was not divested out of him* under the local law of Illinois by anything which he did *prior to his bankruptcy in* 1842; that it remained in him until that event, when it was legally transferred to his assignee by the proceedings in bankruptcy; and that it was afterwards, in 1857, legally sold and conveyed by his assignee, together with the accretion in question, to Samuel F. Sutherland, the grantor of the plaintiff.

To this title of the plaintiff two objections were made by the defendant: 1st, That Kinzie's assignee had no title to the "*locus in*

quo," because, as before stated, the fee of Sand street in front of block 54 had been conveyed by Kinzie to Mrs. Wolcott (under whom the defendant claims) by Kinzie's conveyance to her of that block. 2d, That "no title passed to Sutherland under the assignee's sale," because "the assignee in bankruptcy of Kinzie was *barred* by the 8th section of the Bankrupt act of 1841 *from making any sale or conveyance of this property, after two years from the date of the decree in bankruptcy.*" Printed Record, p. 6.

"The accretion began to form in the lake shore, north of the north pier at the Chicago river, about 1841 or 1842, *beginning to form first down near the pier*, and extending gradually north. There was *not much accretion till the years* 1844 *or* 1845. The storms affected the lake shore line, and in some years the whole accretion was washed away." Ib., p. 7.

In the court below there was no dispute about the facts of the case. They are stated more particularly in the Bill of Exceptions, and need not now be more fully stated. They will be noticed more particularly under their proper places in the argument. The only questions involved were the questions of law growing out of the admitted facts, on which the opinion of the court was against the plaintiff. "Thereupon," says the Bill of Exceptions, "the court instructed the jury, upon the foregoing *agreed statement of facts, that the law was for the defendant*, to which instruction the plaintiff then and there excepted." The plaintiff has sued out this writ of error, and now seeks to reverse the judgment of the court below, and to have a judgment entered in his favor by this court on the agreed statement of facts.

ARGUMENT FOR THE PLAINTIFF IN ERROR.

The logic of the plaintiff's case involves but two main propositions, which may be briefly stated thus:

1st. The accretion in question belongs, as an incident or accessory, to *the owner of the fee of the land*, (viz, the east half of the width of Sand street,) to which it became attached.

2d. The plaintiff is *that owner*, and therefore the accretion in question belongs to him.

I. The first proposition is true, both on principle and authority.

1st. ON PRINCIPLE. It is a necessary consequence of the two legal maxims: "*Res accrescit domino*"—"*Accessorium non ducit, sed sequitur suum principale.*" Broom's Leg. Maxims, p. 368–369. The land is the principal thing; the accretion is but an accessory. *Alluvium is but an accessory—the front tract is the principal.* Bullard, J. 18 Louisiana R., (O. S.,) p. 219. The land, therefore, as the principal thing, draws to itself the ownership of the accretion as an accessory.

2d. ON AUTHORITY. It is also abundantly established by authority, both foreign and domestic. See Angel on Watercourses, p. 53; Angel on Tide Waters, p. 252. Lord Hale's "De Jure Maris," cited 6 Cowen's Rep., p. 542. Chardon's Traite du Droit d'Alluvion, §

159. pp. 264, 266, 270. 1 Garnier's Regime des Eaux, § 248, p. 239, &c. This very question is specially examined by these two French authors, and the conclusion arrived at is, that an accretion formed on the margin of a public road or highway belongs to the owner of the fee of a highway, whoever it may be, whether an individual or the public.

But in regard to this proposition there will be be little or no controversy. In fact, there *can* be none in this case, because it is the *necessary basis of the claim of title* to the accretion *made by both parties*. It may therefore be regarded as both established and admitted.

II. The plaintiff's second main proposition is this: that *he* is *the owner of the fee* of the *east half* of the width of Sand street, to which the accretion in question became attached.

The truth of this *general* proposition depends on the establishment of these three subordinate propositions:

1st. That under the local law of Illinois, the original title of Robert A. Kinzie to the fee of Sand street *was not conveyed by him to the public* by virtue of his plat laying out Kinzie's addition to Chicago. That on the contrary, it was merely *dedicated* to the public for the uses of a *street* running north and south, and *not* for the purposes of a *public landing* at its terminus on the lake, except so far and so long as a public landing might be had at the terminus of that street on the lake; but that if the fee of Sand street *was* conveyed to the public by the plat of Kinzie's addition, under either or both of the laws of Jan. 4, 1825, and Feb. 27, 1833, relating to the town-plats, it was conveyed to it, *in trust only*, for the uses of a *street*, and *not of a public landing;* and that when by accretion on the shore the *original* width of Sand street in front of block 54 *exceeded* the *general* or maximum width of that street, the *excess*, by operation of law, reverted or enured to the benefit of the original owner, inasmuch as it was not needed for the original purposes of the street, and could not legally be devoted to any other purpose.

2d. That *no part* of the fee of Sand street in front of block 54 *was conveyed by Kinzie to Mrs. Wolcott*, under whom the defendant claims, by his deed of Feb. 26, 1833; but that if *any part* of it *was conveyed* to her, it was *only* the *west half*, and *not the east half*, of the width of said street, whether as originally laid out, or as subsequently widened by the accretion, and then only *progressively*, from time to time, as the street became widened to its maximum width.

3d. That Kinzie's original title to the fee of Sand street, or at least to the *east half of it, remained in him until his bankruptcy in* 1842, when it was legally transferred by the proceedings in bankruptcy to his assignee, and by the sale and conveyance of it by his assignee in 1857 to Samuel F. Sutherland, the plaintiff's grantor.

These propositions will be considered in their order, and if established, demonstrate the title of the plaintiff to the land in controversy.

FIRST PROPOSITION.

This proposition will be admitted by the defendant here, as it was

admitted by him in the court below, and as it is admitted in the Bill of Exceptions; because, as he claims *by title* under Kinzie's conveyance of block 54 to Mrs. Wolcott, and *not by possession*, as a *mere intruder*, if *the fee* of Sand street *had been conveyed to the public* by the plat of Kinzie's addition, the defendant himself would have no title.

But as this admission is made by the defendant's counsel, in his brief filed in this case, *not generally*, but on the special basis that the plat of Kinzie's addition is to be governed by the law of Jan. 4, 1825, it becomes necessary for the plaintiff to show that the proposition is true, whether that plat is to be regarded as governed by the law of Jan. 4, 1825, or by the law of Feb. 27, 1833, and that as between these two laws, the plat is to be regarded as governed by the *latter* law, rather than by the former.

The necessity for this inquiry arises in this way:—The Bill of Exceptions states that "this plat was *filed* for record in the Recorder's office of Cook county, Illinois, February 22, 1833, but was *not absolutely recorded or spread on the records until February*, 1834." Printed Record, p. 6. fol. 14. The law of Jan. 4, 1825, was *repealed* by the act of Feb. 27, 1833, from and after its date; and hence it is important to know which of these two laws applies to and governs the map of Kinzie's addition, under that state of facts.

The act of January 4, 1825, (Laws of Illinois for 1824–5, p. 53–54,) is entitled "An act to provide for the recording of Town-Plats."

Section 1 provides: "That the county commissioners of any county, or any other person or persons, his, her, or their legal representatives, who may hereafter lay off any town, *addition* or subdivision of outlots, within this State, shall, *previous to the sale of any lots therein, cause to be recorded* in the recorder's office of the county wherein the same may lie, or may be laid off, *a correct and true plat* of said town, addition, or sub-division, with *the public ground*, (if *any* there be,) *streets, and alleys*, with their respective *names* and *widths properly marked*, and the *lots regularly marked in numerical order*, and *the size* of the lots marked by reference to the plat of said town, addition, or sub-division."

Section 2 provides: "*That every donation or grant to the public*, or any individual or individuals, religious society or societies, or to any corporation or bodies politic, *marked or noted as such on such plat, wherein any donation or grant may have been made*, shall be considered, to all intents and purposes, as *a general warranty* against such donor or donors, their heirs and representatives, to the said donee or donees, grantee or grantees, for his, her, or their use, *for the purposes intended* by the donor or donors, grantor or grantors aforesaid."

Section 3 provides that the makers of plats "shall, at or before the time of offering them for record, *acknowledge the same* before a justice of the Supreme Court," &c., including "a justice of the peace."

The first question under the first section is whether the plat of Kinzie's addition was "*recorded*," within the meaning of that law, "previous to the sale of any lots therein," &c., and previous to *the repeal* of the said law of 1825. The bill of exceptions shows that, although *filed* for record February 22, 1833, it was *not actually*

recorded until February, 1834, and that Kinzie, the proprietor of the addition, conveyed block 54 to Mrs. Wolcott on the 26th of February, 1833, the day before the passage of the act of February 27, 1833.

The counsel for the defendant contends that *filing* for record in regard to *town-plats* is *equivalent*, in law, to *actual recording*. In reply to that suggestion it is sufficient to say, that it required two acts of the Legislature of Illinois and a decision of the Supreme Court to make them equivalents, in regard to *deeds* and *title papers, by name*. The act of January 8, 1829, requires the recorder to keep a book in which he shall immediately make an entry of *every deed or writing* brought to his office to be recorded, mentioning therein *the date, the parties*, and *the place* where the lands are situated, dating the entry on the day and when it was brought to the office for record. This book was required to be kept for the purpose of furnishing information to *creditors and purchasers*. And accordingly, the Supreme Court held in 1 Gilman's Ill. Rep., pp. 578, 579, that *an entry of a deed* in that book was equivalent to recording it for *the purposes of information* to creditors and purchasers. But that law and that decision had no reference to *town-plats*.

The act of January 18, 1833, relating to the recording of *deeds and other title papers*, enacts that they shall operate, *as against creditors and subsequent purchasers*, from and after *the filing* of the same for record. Ib. But it has been expressly decided by the Supreme Court of Illinois, in the case of Manly *vs.* Gibson, 13 Illinois R., p. 308, that a town plat is *not a necessary muniment of the title of a town lot*. Besides, the fact that the act of February 27, 1833, relating to the recording of town-plats, passed so recently after the act of January 18, 1833, relating to the recording of deeds, &c., does not provide that the *filing* of plats shall be equivalent in law to *recording* them, shows that the Legislature did not so intend, but required an *actual record of town plats*. It appears, therefore, that the law of Jan. 4, 1825, expressly required a town plat to be *actually recorded, before* any sales of lots were made; and that the subsequent law making *filing* equivalent to recording applies *only to deeds or other title papers*, and *not* to *town plats*, and not even to the former, for *all* purposes, but only as against *creditors and subsequent purchasers*. The importance of this will be seen hereafter, when we come to consider the provisions of the act of February 27, 1833.

The second question under the first and third sections of the law of 1825, is whether the plat of Kinzie's addition is such a plat as was required by those provisions of that act?

That it is, will not be pretended, as an inspection of the map will show. It is *not* "a correct and true plat of said addition." It contains *no scale* of measurement. The *widths* of the streets and alleys are *not* "*properly marked*," as the numbers placed upon them do not indicate whether they mean *feet* or *inches*. The widths of the *alleys are not marked at all*. The lots and blocks are *not regularly numbered*, in numerical order, because the water lots are numbered by themselves.

The numbers of the lots in the blocks which are not divided are numbered separately, from 1 to 12, or less; in the majority of cases, neither the *size* of the lots or blocks, in *length* or *breadth*, is given. This is specially true in regard to all the water-lots, and to all the blocks lying east of Sand street. The *plat, as such, was not acknowledged at all.* The only *pretence* of acknowledgment was, that "Robert A. Kinzie acknowledged himself to be *the proprietor* of Kinzie's addition to Chicago," &c. This enumeration of the defects and omissions of the map is sufficient to show that it was *invalid* and defective, and that it was not such a map as was required by the provisions of the act of 1825.

The third question arising on the first and second sections of that act is, whether "*streets* and *alleys*" are to be regarded as "*public grounds,*" as mentioned in the first section; or as "donations and grants to the public," as mentioned in the second section. The first section expressly *distinguishes* between public grounds, on the one hand, and streets and alleys on the other. It required "a correct and true plat, with the public ground, (*if any there be,*) streets, alleys, &c.," clearly indicating that, in the contemplation of this law, the latter might exist on a plat, and not the former. This distinction is still further supported by the language of the second section. It provides, that "*every donation* or *grant to the public, marked or noted as such* on such *plat, wherein any donation or grant may have been made,*" *&c.*, clearly implying that town plats might be made, *wherein no grant or donation to the public had been made.* But this could not possibly be, if "streets and alleys," which enter into the very idea of a *town plat*, are to be regarded as included in the terms, "donations or grants to the public." This distinction is still further strengthened by the connection in which the words "donation or grant to the public" are used—viz: along with those made to "individuals, religious societies, corporations, and bodies politic." It is evident, therefore, that "streets and alleys," by the provisions of this law, are *not* regarded as "public grounds," or as "donations or grants to the public."

The fourth and last question arising on the second section is, whether, if the plat was valid, the "general warranty" there spoken of means a *deed of conveyance* with general warranty, or merely a *covenant* of general warranty. If it means the former, and "streets and alleys" are to be regarded as "public grounds," or as "donations or grants to the public," then the import of the law would be, that they would be *conveyed* in fee to the public, but even then, in the language of the law, only "for *the purposes intended* by the donor or donors, grantor or grantors, aforesaid." If, on the contrary, it means merely a *covenant*, then they would *not* be conveyed in fee, but the fee remaining in the proprietor of the plat, they would be held by him, subject to "*the use,*" for "*the purposes* intended." But whatever views may be entertained on any or on all of these questions, their importance must depend entirely on the fact whether the law of 1825 remained in force, or was *repealed* by the law of 1833, so far as related to its effect on the plat of Kinzie's addition to Chicago.

The act of Feb. 27, 1833, (Revised laws of Illinois for 1833, p. 599,

&c.,) is also entitled "An act providing for the *recording* of town-plats." Section 7 provides that, where *any town, addition*, or subdivision of out-lots *has been heretofore laid out* and *lots sold* in this State, either by county agents, commissioners, or other persons, *and a plat or map of the same has not been acknowledged and recorded as required by the act*, entitled "An act to provide for the recording of town plats," approved January 4, 1825, and an amendment to said act passed at a subsequent session, *it shall be the duty* [*of those laying out the same*, without exception,] *to have the same* fairly, fully, and clearly *made out, certified, acknowledged and recorded in the proper county, in the form and manner required by this act*, noticing and particularly describing *the donations of land*, or otherwise, to individuals, societies, bodies politic, or for common or public uses, if any shall have been made, *by the first day of January*, 1834. *Provided*, That if the lots shall have been *differently numbered*, and *sales made*, and they cannot well be changed, *they shall be returned as originally stated; but in all other respects the plat or map shall conform to the requisitions of this act, &c.* Ib., pp. 600, 601.

Section 12 remits forfeitures incurred under the act of 1825, and expressly provides as follows: "And the said *act of January* 4, 1825, and the amendatory act thereto, be and they *are hereby repealed*. This act to take effect *from and after its passage*. Approved Feb. 27, 1833." Ib., p. 602.

The plat of Kinzie's addition, therefore, falls expressly within the provisions of this law. As we have already seen, it was a case in which an "addition" had been *previously* laid out and lots sold; in which a plat or map of the same *had not been acknowledged and recorded*, as required by the act of 1825; a case in which a new map was required by the law of 1833 to be made in conformity to its provisions, but in which no new map ever was made, either before Jan. 1, 1834, or at any time afterwards; and a case in which the old map was not actually recorded until February, 1834, a year after the act of 1825 had been repealed. If, then, that act was *repealed* from and after Feb. 27, 1833, and a *new map* of Kinzie's addition was required to be made by Kinzie, in conformity to the requirements of the new law of Feb. 27, 1833, it then becomes important in this connection to know what these requirements are, in order that the old map may be tested by them also.

Section 1 provides that "the plat or map" required to be made "shall *particularly* describe and set forth all the streets, alleys, commons or public grounds, and all in and out-lots, or fractional lots, within, adjoining or adjacent to said town, giving the names, *widths, corners, boundaries* and *extent* of *all such streets and alleys.*"

Section 2 provides that "all the in-lots intended for sale shall be numbered in progressive numbers, or by the squares in which they are situated, and *their precise length and width* shall be stated on said plat or map; and out-lots which shall *not exceed ten acres* in size shall in like manner be surveyed and numbered, and *their precise length and width* stated on the plat or map, together with any streets, alleys, or roads which shall divide or border on the same."

Section 3 provides that *corner-stones* shall be placed at the time of the survey at various points named, "for corners from which to make future surveys; and *the point or points*, where the same may be found, *shall be designated on the plat or map.*"

Section 4 provides that the plat shall be certified, acknowledged, and recorded, &c.

Section 5 provides that "The plat or map, *when made out* and *certified, acknowledged, and recorded as required by this act*—every donation or grant to the public, or any individual or individuals, or religious society or societies, or to any corporation or bodies politic, marked or noted as such on said plat or map—*shall be deemed* in law and in equity *a sufficient conveyance to vest the fee simple* of all such parcel or parcels of land as are therein expressed, *and shall be considered* to all intents and purposes as *a general warranty* against such donor or donors, their heirs and representatives, to the said donee or donees, grantee or grantees, for his, her or their use, *for the uses and purposes therein named, expressed or intended, and no other use or purpose whatever.* And the *land intended* to be *for streets*, alleys, ways, commons, or *other public uses*, in any town or city, or addition thereto, *shall be held in* the corporate name thereof, *in trust* to, and for the uses and purposes set forth and expressed or intended." Ib., p. 600.

If, then, the plat of Kinzie's addition to Chicago was *invalid* and defective when tested by the requirements of the law of 1825, it is obvious, at a glance, that it is still more invalid and defective when tested by those of the law of 1833; because the latter law differs from the former mainly *in adding additional requirements*, which were not observed and could not be observed, because the map was made before the passage of the latter law, and no new map was made before January 1st, 1834, or afterwards. The same questions and distinctions may be made in regard to the meaning of the provisions of the law of 1833 which have already been presented in regard to the law of 1825, and with the same results. They need not, therefore, be repeated.

But the conclusions for which we contend are still more clear and free from doubt under the law of 1833 than under the law of 1825; because it is expressly provided, that the fee of "donations and grants to the public," (whether they include *streets* and *alleys* or not,) shall be conveyed to the public by the plat, *only* "*when made out and certified, acknowledged and recorded as required by that act*,"—which is not pretended in the case of this plat of Kinzie's addition to Chicago.

The requirements of a statute, to confer the rights contemplated by it, must be pursued in all its essential requirements. *Kidder* vs. *City of Peoria*, 29 Illinos R., p. 79–80. *Town* vs. *Town of Blachberry*, Ib., p. 138. 27 Barbour N. Y., p. 252, &c. Manly *vs.* Gibson, 13 Illinois R., p. 312–313.

Therefore the fee of the streets, &c., was not conveyed to the public by the plat of Kinzie's addition to Chicago.

The result, therefore, of the failure of that plat to convey the fee of its streets and alleys to the public was a *dedication* of the land

occupied by them to the public use, *as such*. *Manly* vs. *Gibson*, 13 Illinois R., pp. 308, 312–313.

The law of dedication is thus declared in *Godfrey* vs. *City of Alton*: "A dedication may be made by grant, or *other instrument*, or it may be evidenced by acts and declarations, without writing. *No particular form is required to the validity of a dedication.* It is purely a question of *intention*. *A dedication may be made by a survey and plat alone*, without any declaration either oral or on the plat, when it is evident from the face of the plat that it was the intention of the proprietor to set apart certain grounds for the use of the public. * * * *A dedication must be understood and construed with reference to the objects and purposes for which it was made.* This is particularly the case with a *public landing* upon a navigable watercourse. *That is necessarily inseparable from the margin of the water, however that may fluctuate.* 12 Illinois R., p. 35–36; see also 29 Illinois R., p. 491–492.

But even if that plat operated as a statutory conveyance of the fee of the streets and alleys of Kinzie's addition—under the act of February 27, 1833—by the express declaration of that law, "the land intended to be for streets, alleys, commons, or other public uses, in any town or city, or addition thereto, shall be held in the corporate name thereof, *in trust*, to and for *the uses and purposes set forth and expressed or intended*, and for no other use or purpose whatever." Revised Laws of Illinois for 1833, p. 600, sec. 5.

Streets cannot be used for any other purpose than *as streets*. *Murphy* vs. *City of Chicago*, 30 Illinois R., p. 286. The excess of the accretion beyond what was necessary for filling up the maximum width of Sand street would therefore revert to the original proprietor. A dedication for *one purpose* is *not* a dedication *for every purpose*. See 6 Peters' U. S. R., 438. 6 Hill N. Y. R., p. 412. 1 Bouvier's Inst., § 443, p. 175. 7 Louis. Ann. R., 78. 18 Louis. R., 187–189 248. Commonwealth *vs.* Roxbury, Gray's Mass. R., p.

The first proposition may therefore be regarded as established.

SECOND PROPOSITION.

That *no part* of the fee of Sand street in front of block 54 was conveyed by Kinzie to Mrs. Wolcott, (under whom the defendant claims,) by his deed of February 26, 1863; but that if *any part* of it was conveyed, it was *only* the *west half*, and not the east half of the actual width of said street, whether as originally laid out, or as subsequently widened by accretion, and then *only progressively*, from time to time, as the street became widened to its maximum width.

This is the real hinge of the controversy, as it develops the radical point, affirmed by the one side and denied by the other. Each claims to be the owner, by paper title, of the fee of that part of Sand street to which the accretion became attached, and now the question is: To whom, by the law of Illinois, does it belong?

This is purely a question of *local law*, and it must be determined by the law of that State, and by the law of no other State. For that reason, I decline in advance the needless task of attempting to

thread the labyrinth of conflicting decisions on this point, made sometimes in the same State and in the different States of our Union. The simple question is, what is the law of Illinois on this point? and to that question alone I propose to confine my argument.

If the last branch of the first proposition is true, then it is self-evident that if the fee of Sand street was conveyed to the public, by the plat of Kinzie's addition, *no part* of it was conveyed to Mrs. Wolcott by Kinzie's deed of February 26, 1833.

If, on the contrary, the fee of Sand street was *not* conveyed to the public, either because the statute applicable to that plat did not so provide, or because, the grant being *conditional*, it did not take effect as *a statutory conveyance*, but only as a *dedication* to public use, because the conditions precedent of the grant were not complied with, thereby leaving the fee of the street in Kinzie, the question then arises which is presented by the second proposition, whether any part of it was conveyed to Mrs. Wolcott, and, if any, what part?

The plaintiff contends, 1st. That *no part* of the fee of Sand street was conveyed by Kinzie to Mrs. Wolcott, by his deed to her for block 54, because, by the law of Illinois, the fee of the streets and alleys of its towns and cities is vested, either in the public, as provided by the statute relating to town plats; or on failure of a conveyance of the fee to the public, from any cause, it continues in the founder of the town or city who made the plat, burdened by the dedication thereby made with the public easement.

The policy of the law of Illinois, as proved both by its legislation and by its judicial decisions, aims at *unity of title* in the ownership of the fee of streets and alleys in towns and cities, as far as possible. This can only be accomplished in one or other of the two modes just mentioned, and either of them excludes the *divided* and *multiplied private ownership* of the fee of streets and alleys by the co-terminous owners of the opposite lots fronting on them, as claimed by the defendant. If there is any useful public policy in having the title to the fee of them vested in the public as a *primary object* of public policy, then there is also a *like* public policy, (when from any cause that end is defeated by the failure of the first method,) in having it accomplished as nearly as possible by the second method—that is, by having the title to the fee remain in the original proprietor, because that is the next most effectual method of accomplishing that end. The fact that the Legislature of Illinois has *twice* solemnly declared, in effect, that the fee of streets and alleys *shall not* vest in the opposite lot holders, is sufficient evidence of the legislative intention, that the principles of the common law, as maintained by defendant's counsel, shall not prevail in Illinois, by judicial construction or otherwise.

This doctrine is fully established by a series of decisions by the Supreme Court of Illinois, which show the progressive development of the doctrine for which we contend.

The first case is that of *The Canal Trustees* vs. *Havens et al.*, 11 Illinois R., p. 554, &c.

The opinion in that case was delivered by Ch. J. Treat.

The question was whether the Havens, the appellees, were *riparian owners* (the same pretence made by the defendant in this case) on the west bank of the Des Plaines river. They were the owners of lots one and four in block 56 on the west side of the river, *from which they were separated by a street*, running up and down the stream.

After quoting the provisions of the act of February 27, 1833, relating to town-plats—which statute as we have already seen applies indirectly to the case—the opinion proceeds:

"Under this statute, the legal title to the land embraced by a street is vested in the corporation of the town or city, for the use and benefit of the public. *It is not in the power of the proprietor of the lots to transfer the fee in the street to his grantee.* * * * *A purchaser only acquires a title to the land included within the actual limits of the lot as designated on the plat. He takes no interest in the street, except in common with the public*—the right of passage over it. He is estopped by the solemn act of his grantor from claiming title to the centre of the street. Whether the title would revert to the former proprietor on the dissolution of the corporation, or the abandonment of the ground for the purposes of a street, is a question which it is needless now to discuss."

Now, a plat made under that law is either *valid* or *invalid*, as *against the maker*. But whether *valid* or *invalid*, the effect of the conveyance of a lot in said plat must be *the same*, so far as the rights of the *grantee* are concerned. Whether the plat operates as a conveyance of the fee of the streets, &c., is a question with which a lot holder has nothing to do. It is solely a question between the founder of the town and the public.

The second case is that of *Hunter* vs. *Middleton*, 13 *Illinois R., pp.* 50, 54, 55, in which the opinion is also delivered by Chief Justice Treat, affirming the doctrine of *The Canal Trustees* vs. *Havens et al.*

The third case is that of *Manly* vs. *Gibson*, Ib., p. 308. In that case, also, the opinion was delivered by Chief Justice Treat, in which the whole law of the State of Illinois on this subject is summarized, as follows:

"Where the corporate authority of a town claims the fee of the streets and alleys within its limits, *it must appear that a plat has been regularly made and recorded.* In such a case it is the acknowledgment and recording of the plat that vests the fee in the corporation. The plat operates as a grant to the corporation of the grounds designated thereon for public purposes." *Canal Trustees* vs. *Havens*, Illinois, 554. *But the public may have an interest in the streets and alleys, although the ground has not been set apart for the purpose, in the manner prescribed by statute.* A *dedication* of ground to public uses may be made *in other ways* than by the making and recording of a town plat. In the case of a *valid* plat, the title to the ground set apart for public purposes is held by the corporation for the use and benefit of the public: *in the case of a dedication by a different mode, the fee continues in the proprietor, burdened with the public easement.*" Ib., p. 312–313. Treat, Ch. J.

Now, the plat of Kinzie's addition is *not a valid plat*, as we have already seen, whether judged by the law of 1825 or the law of 1833. This last decision, therefore, asserts the very doctrine for which we contend. The law

of Illinois, it will be observed, recognizes *no intermediate status* of the title to the fee of the streets and alleys of towns and cities. The fee is vested by law either in the municipal corporation for the use and benefit of the public, or in the absence of a *valid plat, regularly* made, acknowledged, and recorded, as required by law, it remains in the founder of the town or city, burdened with the public easement. The research of the counsel for the defence has not enabled him to point to a single case in the State of Illinois in which its courts have decided that a lot holder, in a town or city, owns *to the centre of the adjoining streets or alleys*. This furnishes the strongest *negative* evidence of the truth of our position. More than this, the fact already referred to, that this matter has been made the subject of *express legislation*, shows *positively* the intention of the legislature, that the title to the fee of streets and alleys shall not be in the adjoining proprietors of lots.

While such is the local law of Illinois, it is satisfactory to know that this is also the common law of other States. The authorities on this point will be found collected in Angell on Highways, § 149, and in the American note to 2 Smith's Lead. Cases, (44 Law Lib.,) pp. 139, 140, 142, 143. The annotator, while he admits that the general law *is* as we have contended, argues, nevertheless, that *it ought*, in his judgment, *to be different*, (Ib., p. 144–145,) for the sake of theoretical symmetry; but he admits, at the same time, that the *practical result to the public* is the same, under the doctrine for which we contend. However this may be, it is enough for us to know that the law of Illinois, as declared by its Supreme Court, is that declared by the proposition under discussion.

2d. But admitting, for the sake of the argument, that *any part* of the fee of Sand street was conveyed by Kinzie's conveyance of block 54 to Mrs. Wolcott, still, it was only the *west half* and *not the east half* of the width of that street which was conveyed to her, whether we consider it as it was originally laid out, or as it was subsequently widened by the accretion; and then *only progressively*, from time to time, as the street became widened to its maximum width.

Block 54 was bounded at the point in question by Sand street, not by Lake Michigan. Mrs. Wolcott could therefore only claim title to the centre of that boundary, that is, to the centre of the street at that point, as it existed at the time of the grant.

This point need not be argued; it is expressly decided by the Supreme Court of Illinois, in the case of *The Canal Trustees* vs. *Havens et al.*, 11 *Illinois R., p.* 555, *&c.*,

The Havens, as before stated, were the owners of lots one and four in block fifty-six, on the west side of the Des Plaines river, *from which they were separated by a street*, running up and down stream. They claimed, nevertheless, to be *riparian proprietors.*

In answer to that pretension, the Court says in that case: "There are two conclusive reasons why the appellees are *not riparian proprietors* on the west bank of the river," &c. The first reason has already been quoted in a previous part of the argument, and is based on the statute of Illinois.

"But, independent of the statute," says the Court, "there is a decided objection to the claim of the appellees to riparian rights on the west bank of the river. By the common law, a grant of land bordering on a highway or river carried the exclusive right and title in the highway or river to the center thereof, subject to the right of passage in the public, unless the terms of the grant clearly indicated an intention on the part of the grantor to confine the grant to the edge or margin. In such case the highway or river is regarded as the boundary or monument, and the purchaser takes to the middle of the monument, as part and parcel of the grant. "This is stating the principle as broadly as it is laid down in any of the elementary books, or established by any of the adjudged cases. *Conceding*, then, *for the purpose of the argument*, that the doctrine of the common law *is* strictly applicable to this case, and applying it in its full extent, the appellees would fail utterly to make good their claim. *Their grant would only carry them to the middle of the boundary.* They would have *no title whatever to the east half* of the street, or the west half of the bed of the river. In every point of view, therefore, the appellees are *not* riparian owners on the west bank of the stream." Ib., p. 557.

It would be difficult to find a case more directly in point. It rules this branch of the case fully. But it will, no doubt, be argued that as Sand street at the point in question had *less* than *half* of the *general* width of that street, *the lake* was the boundary of block 54 at that point.

But Sand street at *that point* and *at that time* had *no greater width* than the map actually showed. That there ever would be an accretion at that point could not have been foreseen. Sand street, therefore, never was designed by Kinzie to be wider there than the map shows. Block 54 is *bounded by the street*, and *not by the lake*, as is assumed by the defendant. Applying the doctrine for which the defendant contends, in regard to the street as a boundary, the grant to Mrs. Wolcott could only carry her *to the middle of the boundary*—that is, to the middle of *the street* as it then was. If the *street widened* by accretion, still her grant could only carry her to the middle of the widened boundary, and so progressively, until it had reached its maximum width. This would still leave her and her grantees without title to the eastern half of the street—that is, to the margin of the lake—without which they can have no legal title to the accretion in question.

The principle that is applied to Sand street, opposite block 54, must also be applied to it opposite block 45. It is true that Sand street opposite block 54 has *less* than half the maximum width of Sand street further south; but opposite block 45 it is *more* than half that width, though of less than its maximum width. Block 44 cannot have a greater frontage on the lake, or claim a greater share of the accretion, than its original lake shore gave it. Now, what becomes of the accretion opposite block 45? It cannot be pretended that the owners of the north part of block 45 are *riparian owners;* and why? because they are bounded by Sand street, and because, on

the principle of title to the middle of the boundary, they can claim title only to the middle of the street at that point, where it has less than the maximum width. For the same reason, the owner of the south-east corner of block 54 can only claim title to the middle of the street at that point, as it existed at the time of the grant—the only difference in the cases being that Sand street at that point was not so wide opposite block 54 as it was opposite block 45; but in both cases it had less than the maximum width of the street further south. Whatever rule is adopted must determine the ownership of the accretion formed in front of both of these blocks.

The Louisiana cases, relied on by the defendant, which would make him a *riparian owner*, notwithstanding his lot is separated from the lake by a street, can have no application to this case, because they rest on an assumed basis, which has no existence in Illinois. It is not true, there, as is decided in some of the Louisiana cases, that the owners of the lots of a town or city fronting the water *owe a street or road to the public, and that they own the land to the water's edge*. This pretence was made in the case of Smith *vs* St. Louis Public Schools, 30 Missouri R., p. 290, and is there completely refuted and overthrown. It is not now the law, even in France, from which country it was borrowed. In Chardon's Traité d'Alluvion, § 159, p. 264–270; 1 Garnier's Regime des Eaux, § 249, p. 239, &c.; on the point that a lot bounded by a street in a town or city, fronting the water, is bounded by the street, and not by the water, and is therefore not entitled to riparian rights, see also Smith *vs.* City of St. Louis, 21 Missouri R., p. 36; City of Mobile *vs.* Eslava, 16 Peters R., p. 252.

THIRD PROPOSITION.

That Kinzie's original title to the fee of Sand street, or, at least, to the east half of it, *remained* in him until his bankruptcy in 1842, when it was legally conveyed by the proceedings in bankruptcy to his assignee, and by the sale and conveyance of his assignee in 1857, to Samuel F. Sutherland, the plaintiff's grantor.

The first branch of this proposition is merely the logical sequence of the two antecedent propositions, because if the fee of Sand street was neither conveyed by Kinzie to the public, nor to Mrs. Wolcott, then it must have *remained* in him up to the period of his bankruptcy in 1842, when it was legally conveyed by the proceedings in bankruptcy to his assignee.

The facts bearing in the second branch of the proposition are these:

"*The accretion began to form* on the lake shore north of the north pier at the Chicago river *about* 1841 *or* 1842, beginning to form first down near the pier, and extending gradually north. *There was not much accretion till the years* 1844 *or* 1845. The storms affected the lake shore line, and *some years the whole accretion was washed away.*" Printed Record, p. 7, fol. 17–18.

"Robert A. Kinzie became a bankrupt in 1842.

"In March, 1857, the general assignee filed a petition in the United States District Court of Illinois, for *an order to sell certain real property discovered since former sales*, which property is described in his petition, *and includes the lot in question*. An order of sale was made by the court, and the property sold for $5,000 to Samuel F. Sutherland, the grantor of the plaintiff. Sale reported, &c. There is no controversy about the regularity of the proceedings by the assignee, but the defendant insisted that the assignee in bankruptcy of Kinzie was barred by the 8th section of bankrupt act of 1841 from making any sale or conveyance of this property after the lapse of two years from the date of the decree in bankruptcy, and on that ground objected to the introduction in evidence of the plaintiff's title derived from those proceedings; and the defendant *objected generally* that Kinzie's assignee had no title to the '*locus in quo*,' and that no title passed to Sutherland." Printed Record, p. 6, fol. 15–16.

The general objection that "the assignee had no title to the *locus in quo*," has already been answered by the first two propositions.

The second objection is, that no title passed from the assignee to the purchaser at the bankrupt sale, for the reason before stated: that the assignee was prohibited by the 8th section of the act of 1841 *from making any sale or conveyance* of this property after the lapse of two years from the date of the decree in bankruptcy. But that section makes *no such prohibition*. It merely provides that *no suit* shall be *brought by or against the assignee*, or by or against any person claiming an adverse interest &c., unless brought within two years after the decree in bankruptcy. It contains no provision whatever in regard to the sale or conveyance of the property of the bankrupt, either as to *time* or *manner*. By its *express* terms its provisions are limited to *suits* brought *by* or *against the assignee*.

The limitation was one of policy, directed to the end of *limiting*, in point of time, the *litigation* in which *the assignee* might be involved, and was evidently made with the view of expediting the settlement of the estates of bankrupts, and not with a view to shorten the period of the statute of limitations in favor of trespassers in possession of the property of the bankrupt. While the first is an object entirely within the power of the national government, the latter is not, because it is a matter of purely local and State regulation.

But in this case, there is no evidence to show that the defendant was in possession of any part of the accretion in controversy within two years after the decree of bankruptcy. On the contrary, the evidence leads to the opposite conclusion. The assignee, therefore, could not, and did not bring *any suit* for the recovery of the property in question within two years after the decree of bankruptcy. But when, afterwards, the accretion had formed, and it was found to be available for the payment of the debts of the bankrupt, inasmuch as a *suit* could not be brought by the assignee for its recovery, it was *sold*, and produced the sum of $5,000 for the payment of his debts. It is idle, therefore, to speak of this case as belonging to the speculative class. The assignee of the purchaser at that sale brought this suit. The public policy which would prevent the assignee of the bankrupt

from sueing does not apply to him, and a party in possession without right cannot invoke the protection of the two years' limitation to prevent a recovery: first, because the statute does not prohibit a sale or conveyance after that period, and the sale transfers the title of the bankrupt as fully as if made by him before his bankruptcy; second, because this suit is not brought by the assignee in bankruptcy; third, because the statute, by merely requiring the estate of the bankrupt to be settled within two years, "if practicable," permissively allows a greater period, if necessary; fourth, because, as a practical construction of that act, it has been the common practice throughout the different judicial districts to apply for orders to sell newly discovered or other real estate long after the lapse of two years from the decree of bankruptcy, and for the District Courts, as in this case, to grant them.

While there are no express decisions by the United States Courts on this point, their practice in granting these orders of sale is equally good evidence of the exposition given by them to this limitation of the bankrupt act. In the State courts, however, there have been a number of decisions, and while those courts have not been entirely unanimous in their views, still, the great mass of State authority is in harmony with the views here presented, and with the practical exposition of that act given by the action of the United States Courts.

The clearest exposition of this point in the State Reports is contained in the late decision of the Supreme Court of Illinois in the case of *Holbrook* vs. *Brenner, et al.*, 31 Illinois Rep., p. 513–515. In that case precisely the same question was made by the defendant, which is made by the defendant in this. In disposing of it, the Court says: "It is again urged that the assignee had *no power to sell* the premises, after the expiration of two years from the time of his appointment. The eighth section of the bankrupt act limits the period within which the assignee *may sue* to recover the assets of the bankrupt to two years after the bankruptcy, or the cause of suit has accrued. The tenth section provides that 'all proceedings in bankruptcy in each case shall, if practicable, be finally adjusted, settled, and brought to a close by the court, within two years after the decree declaring the bankruptcy.' The first of these provisions, in terms, relates *to the bringing of suits* to recover assets. *It in nowise relates to the sale of property.* There does not seem to be the remotest connection between *maintaining a suit* and *selling property.* But it is contended that as the assignee could not recover these premises by an action, he could not transfer the right to maintain an action. The title was vested in him, and he, by the requirements of the law, was bound to sell it, and *no time for its sale is prescribed.* And where we find that the law has vested him with the title for a particular purpose, and has limited no period within which he shall carry out that purpose, we cannot infer that it shall be defeated, because the law has required the performance of *other acts* within a limited time.

"The property is vested in him for the benefit of creditors, and it cannot be that it was designed that if, from any cause, it was not sold, they, without fault or neglect on their part, should be deprived

of their beneficial interest in the trust fund. It will hardly be contended that where real estate is vested in an assignee, reduced to his possession, but from any cause not sold until the expiration of two years, and after its sale an adverse possession was acquired, the purchaser could not maintain ejectment. And the doctrine contended for would lead to this conclusion. The title was manifestly transferred to the assignee for the purpose of paying creditors, and the assignee was required to sell it for that purpose, and the doctrine contended for would be well calculated to defeat the design of the law.

"The provisions of the tenth section are *not imperative*, but are *advisory*. It provides that the entire business of the bankrupt, *if practicable*, shall be closed up within two years. But it imposes no penalties and divests no titles to property if it is not done. The very fact that it only requires the business to be closed, *if practicable*, implies that if it is not done, the assignee shall still proceed to close the business. And it would seem inevitably to follow, that if he had the title to property not sold, he might dispose of and convey it, and thereby pass the title. When the law cast upon him the title, it made no provision for it to be divested, except by sale or the appointment of a successor. And the law could not have designed to offer him the property as a premium for neglecting his duty in making a sale, and if he cannot sell it after that period, it would become his absolutely and unconditionally. Such could not have been the design of the lawmakers. We are, therefore, of the opinion that the assignee had the power to sell and convey the premises after the expiration of the two years, and that the purchaser acquired all the rights of the bankrupt."

To the same effect are the cases of Warren *vs.* Miller, 38 Maine Rep., p. 108, 111; Fenton *vs.* Lorengan, 29 Penna. Rep., 471; Carr *vs.* Lloyd, 29 Maine R., 51. See also the case of Clark *vs.* Clark, 17 Howard, U. S. R., p. 315, in which it is decided that the *bankrupt himself* is *not such an adverse holder* as is contemplated by the eighth section of that law—thus showing a disposition to give such a construction to that act as will best protect the rights of creditors, by securing to them the property of the bankrupt.

The case of *Cleveland* vs. *Boerem et al.*, 24 New York, 613, and 27 Barbour, N. J. R., 252, is the only case cited by the defendant to sustain his views. The doctrines of that case are so evidently devised to meet the exigencies of that case, and so contrary to the doctrines held elsewhere on the same subjects, that it cannot be regarded as controlling authority in this court.

The third proposition may therefore be regarded as fully established; and if so, in connection with the two previous propositions before established, it may be regarded as establishing the second main proposition before laid down, viz: that the plaintiff is the owner of the fee of at least the east half of Sand street, to which the accretion in question became attached; and consequently, under both of the premises of the argument, to the accretion itself.

While such is the legal result of this controversy, the attitude of

the plaintiff and the defendant is entirely different in point of merit. The plaintiff seeks not to take from the defendant any part of block 54. He leaves him in the full possession of all that he ever bought and paid for. He simply asks that the defendant shall surrender what does not belong to him; that he shall yield to the plaintiff a piece of property which the plaintiff has bought in good faith under the title of the original owner, and for which, under the circumstances, he has paid a large and liberal price, viz: the sum of $5,000.

Inasmuch, therefore, as the questions in this case are purely questions of law, and the facts are admitted on the record by both sides, the plaintiff asks that this court will not simply reverse the judgment of the court below, but that it will either enter such judgment for the plaintiff as ought to have been entered there, or that it will direct such a judgment for the plaintiff, to be entered by that court "*non obstante veredicto*," as will obviate the necessity of any further trial in the court below.

JOHN A. WILLS,
Plaintiff's Counsel.

McGill & Witherow, Printers & Stereotypers, Washington, D. C.

IN THE

SUPREME COURT OF THE UNITED STATES,

DECEMBER TERM, 1863.

No. ~~2~~4. 105

WILLIAM E. BANKS,

Plaintiff in Error,

vs.

WILLIAM B. OGDEN,

Defendant in Error.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

SAM'L W. FULLER, *for Defendant in Error.*

CHICAGO:

BEACH & BARNARD, PRINTERS, 14 SOUTH CLARK STREET.

BRIEF AND ARGUMENT.

ROBERT A. KINZIE was the owner in fee of the tract of land known as "Kinzie's Addition to the City of Chicago," and made a plat of it, which he filed for record in the office of the Recorder of Cook county, Illinois, on the 22d day of February, 1833. (Record, page 6).

The premises in question have been formed since that date, by accretion on the east side of that tract. (Testimony of Lill, page 7).

At the time Kinzie made and filed the plat for record, there was only a narrow, triangular shaped piece of land between the east line of block fifty-four in that addition, and the water of Lake Michigan, that formed a partial prolongation of Sand street, which, to the south of that block, was designated on the plat as of the same width with the other streets in that addition.

Sand street was not extended upon the plat any further than the land then sufficed for that purpose; but since the plat was made, sufficient land has formed by accretion, to make Sand street of full width in front of block fifty-four, and to form lots, and even blocks, to the east of it. The premises demanded in this action are a part of the land thus formed to the eastward of the centre of Sand street, since the adjacent land was laid out by Kinzie in 1833. The shore line to the east of Kinzie's addition, was indicated on the plat by a line that will be seen on the original plat, which will be produced on the argument of this case.

No plat of the premises appears to have been printed with the record, although one was made a part of it. The

original plat will be produced on the argument of this case, and a rough draft of one is attached to this brief, which will make the "lay of the land" sufficiently plain to the court.

Kinzie, being the owner of block 54, on the 26th day of February, 1833, four days after he filed the plat for record, sold and conveyed it to Ellen M. Woolcott, by the following description:

"All the right, title, claim and interest of him, the said "Robert A. Kinzie, in and to the following described lots, "or parcels of land, situate, &c., in Cook county, Illinois, "and in Kinzie's addition to the town of Chicago, and "known and designated in the plan of said addition to the "said town of Chicago as follows, viz.: lots numbered * * "* * *, and whole blocks numbered * * * * and 54, all "of which may be seen by reference to the plan of said "addition. To have and to hold, &c., with all and singu- "lar, the rights, privileges and appurtenances, rents, issues "and profits, remainder and reversion unto the same be- "longing."

Kinzie was declared a bankrupt under the act of Congress of August 19, 1841.

Statutes at Large, vol. 5, p. 440.

The premises demanded in this action were not inventoried among his assets at that time, but in 1857, his bankrupt estate being still unsettled, the general assignee obtained an order to sell Kinzie's supposed interest in those premises, and a sale was made, at which one Sutherland became the purchaser, for $5,000, who conveyed his interest, thus acquired, to the plaintiff in error.

The defendant in error derived title, by conveyance from Ellen M. Woolcott, to the south-east part of block 54, next adjoining the demanded premises. (Record, p. 6.)

Block
54
Superior St.
45
Sand St.
Old Lake Shore Line.
Demanded
Premises.
Abt 200 ft.
Present Lake Shore Line

It is apparent that the first and most important question in the case is, whether or not Robert A. Kinzie had any title remaining in him to any land east of block 54, after making and recording the plat of Kinzie's addition, and making the conveyance to Mrs. Woolcott in February, 1833?

The defendant in error insists that, by making and recording the plat of Kinzie's addition, Kinzie dedicated all the land there was in front of block 54 to the public use, and that, as the land increased, by accretion or otherwise, the public was entitled to extend the street in a line with that part of it south of block 54. "Where a city is laid "out with streets running to the water, such streets should "be held to continue on to the high water, if the city "front is afterwards filled in, or the space enlarged by ac- "cretion or otherwise. Any other doctrine would be de- "structive of the interests of commercial communities."

Wood vs. *San Francisco et al.*, 4 California, 194.

He did not extend the plat beyond the shore line, but by the dedication to the public use, and the conveyance of block 54, he divested himself of all right, title and interest in all the land then there; if it was washed away by the lake after that, it was the loss of those claiming under him; if it was extended, by accretion or otherwise, it ought to be their gain.

II.

The land in front of block 54, at its widest part, did not suffice to make one half the width of the street in February, 1833 (Record, page 7), and the conveyance of block 54 by Kinzie to Ellen M. Woolcott, invested her with the fee, not only of the block itself, but of all the land to the water's edge.

This is submitted as a correct common law proposition, without reference at present to the statutes of Illinois.

"As between grantor and grantee, the conveyane of a "lot bounded upon a street in a city, carries the land to "the centre of the street. There is no difference in this "respect, between the streets of a city and country high-"ways."

Bissell vs. *The New York Central R. R. Co.*, 23 New York, 61.

This case overrules all the preceding ones in New York, which had been supposed to establish a different rule.

Hammond et al. vs. *McLachlin*, 1 Sand., 323;
Herring vs. *Fisher*, same, 344;
Child vs. *Starr*, 4 Hill, 376.

"The idea of an intention in the grantor to withhold his "interest in a road to the middle of it, after parting with "all his right and title to the adjoining land, is never to be "presumed. It would be contrary to universal practice— "it would require an express declaration, or something "equivalent thereto, to sustain such an inference."

3 Kent's Com., 432, and notes, 10th edition;
Angell on Highways, 299, secs. 314–5–6–7;
Adams vs. *Saratoga & Washington R. R. Co.*, 11 Barbour, 44.

"The owner of a village lot is *prima facie* the owner to "the middle of the street."

Adams vs. *Rivers*, 11 Barbour, 390;
Mott vs. *The Mayor & Cor. of New York*, 2 Hilton, 358;
Dovaston vs. *Payne*, 2 Smith's Lead. Cas., 90, and the English and American notes to that case.

We submit that these authorities support the proposition

stated above. It has been supposed by some writers and judges, that the language used by the judges who delivered the opinions of this court in the cases of *The City of Cincinnati* vs. *White's lessee*, 6 Peters, 431, and *Barclay et al.* vs. *Howell's lessee*, same, p. 498, implied that a different rule should be applied to the title of the fee of streets in a city, than to country highways. Judge McLean suggests that, at the close of his opinion in the latter case; but as the case did not depend on that point, nor was it before the court for decision (as he expressly says), there is no weight to be attached to the remark, one way or the other.

All the cases cited above repudiate any such distinction, and there is no reason for such a distinction. The public has all the rights where the fee is in the adjoining owner, that it has where it is not; and when, as is the case in many of our new cities, old streets are abandoned as useless, and new ones opened in their stead, every consideration of sound policy dictates, that in the absence of express limitations to the contrary, the fee in the abandoned streets shall not revert to the original proprietors or their heirs, but shall be held always to have been in the adjoining owner, subject to the public easement.

It would cause a confusion of interests, in the highest degree mischievous, to allow either the original proprietors or their representatives, when the public use has been determined, to claim the abandoned streets, as against the adjoining owners. The public interest does not require it.

The original owners in hardly any imaginable case expect it; nor are they entitled to it, because they have been paid for it, or are presumed to have been, in the increased price of the property which they received because it fronted on a public street; and the adjoining owners are entitled to it as a compensation for the loss of a public highway, in front of their property.

All these considerations were before the Supreme Court of Wisconsin in the well considered case of *Kimball* vs. *The City of Kenosha*, 4 Wisconsin, 321, and that court held that, even where a determinable fee was in the public, under the statutes of the Territories of Wisconsin and Michigan, while the streets were used as such, yet when the public use was determined, the title to the land which had been used for streets vested in the adjoining owners, to the exclusion of the original proprietors and their legal representatives.

Much more should this be the law in cases where the common law rule prevails, and the public have but an easement in the land used for streets.

In the cases sometimes cited from the Massachusetts reports, to support a contrary doctrine, and also the case of *The United States* vs. *Harris*, 1 Sumner, 21, it is apparent that the courts felt bound by the precise words of the description used in the deeds, which were before them, to hold that the parties intended to exclude the lands used for streets from the operation of the deeds. We think it clear, from the language of the court, in the case of *O'Linda* vs. *Lathrop*, 21 Pickering, 292, that they regarded the general rule to be as we have stated, but that the words of the deeds before the court prevented its application in that case.

But the Supreme Court of that State, in the case of *Codman et al.* vs. *Evans*, 1 Allen, 443, decided in 1861, after all the preceding cases had been considered at the bar, in the course of the argument, state this to be the rule on this subject:

"Where land is granted, bounding upon a way, public "or private, the question whether it extends to the side "line or the center line of the way, is a question of con-

" struction in each particular case, and depends upon the " intent of the parties as expressed in the descriptive part " of the deed, explained and illustrated by all the other " parts of the conveyance, and by the localities to which " it applies."

P. 446 of that volume.

In *Phillips* vs. *Bowers*, 7 Gray, 21, a description of a lot, as running " to a street, one rod and a half wide," was held to carry the grant of the fee to the middle line of the street, and to vest it in the grantee, subject to the implied right of way, on the authority of *Newhall* vs. *Iveson*, 8 Cushing, 595.

These cases show that the law in Massachusetts is now the same as that established in New York, by the case of *Bissell* vs. *The Railrovd Co.*, 23 New York, 61.

The case of *Harris et al.* vs. *Elliott*, 10 Peters, 25, only decides that when land is conveyed by precise boundaries, other land, outside those bounds, will not pass under the description of " appurtenances," though used for a street. But this is entirely consistent with the general rule contended for, and we leave this point with the remark that the terms of Kinzie's deed to Mrs. Woolcott, " explained " and illustrated " by the condition " of the premises and " localities to which they apply," lead to the conclusion that he intended to part with all his interest in block 54, and the street, or part of the street, then in front of it, and that the deed may well be construed to be sufficient in law to effect that object.

This rule of the common law was recognized by the Supreme Court of Illinois, but was held not to apply to streets laid out under the peculiar statutes of Illinois.

Canal Trustees vs. *Haven*, 11 Ills., 557;
Manly vs. *Gibson*, 13 Ills., 312;
Hunter vs. *Middleton*, 13 Ills., 54;
Waugh vs. *Leech*, 28 Ills., 488,

are the principal cases decided in Illinois on this question, and they all rest upon the statutes of that State, which, as will hereafter appear, have no application to the streets in Kinzie's addition, because that was laid out before the passage of those laws.

III.

The plat of Kinzie's addition was filed for record on the 22d day of February, 1833, and took effect from that date, notwithstanding it was not fully spread upon the records of the county until a year afterwards,

Cook vs. *Hall*, 1 Gilman, (Ills.) 575,

giving a construction to the law of January 8, 1829, which was in force at the time the plat was filed for record.

IV.

The law of Illinois, requiring town plats to be recorded, in force on the 22d day of February, 1833, at the time of filing the plat for record, was the act of January 4, 1825.

Laws of Illinois, p. 55.

As this act may not be conveniently accessible to the court, we here give the whole of it, as follows:

"AN ACT TO PROVIDE FOR THE RECORDING OF TOWN PLATS."
"APPROVED JANUARY 4TH, 1825."

"SECTION 1. *Be it enacted by the People of the State of "Illinois represented in the General Assembly:* That the "county commissioners of any county, or any other person "or persons, his, her, or their legal representatives, who may "hereafter lay off any town, addition, or subdivision, of out "lots, within this State, shall, previous to the sale of any lots "therein, cause to be recorded in the recorder's office of the "county, wherein the same may lie, or be laid off, a correct

" and true plat of said town, addition or subdivision, with the " public ground, (if any there be), streets and alleys, with " their respective names and widths properly marked, and the " lots regularly numbered, in numerical order, and the size of " the lots marked by reference to the plat of said town, addi- " tion or subdivision."

" SECTION 2. *Be it further enacted*, That every donation " or grant to the public, or any individual or individuals, reli- " gious society or societies, or to any corporation or bodies pol- " itic, marked or noted as such, on such plat, wherein any do- " nation or grant may have been made, shall be considered, " to all intents and purposes, as a general warranty, against " such donor or donors, their heirs and representatives, to the " said donee or donees, grantee or grantees, for his, her, or " their use, for the purposes intended by the donor or donors, " grantor or grantors, aforesaid."

" SECTION 3. *Be it further enacted*, That the county com- " missioners, and every person or persons whose duty it may " be to comply with the foregoing requisitions, shall, at or be- " fore the time of offering such plat or paper or papers for re- " cord, acknowledge the same before a justice of the supreme " court, justice of the circuit court, or justice of the peace, " in the county where the land lies, a certificate of such ac- " knowledgement shall be (by the officers taking the same) en- " dorsed on such plat or other paper, and recorded therewith, " and form a part of said record."

" SECTION 4. *Be it further enacted*, That where any town, " addition, or subdivision of out lots, have heretofore been " laid out and lots sold, in this state, either by county agents, " commissioners, or other persons, and a plat of the same has " not been acknowledged and recorded as contemplated in " this act, it shall be the duty, and it is hereby required of the " present county commissioners, or a majority of them, in such " county, or other person or persons, who have laid out the " same, or his, her, or their legal representatives, to have the " same fairly, fully, and clearly made out, acknowledged and

" recorded, in the proper county where the land lies, on or be-
" fore the first day of August next; and if any county com-
" missioner or commissioners, or other person or persons whose
" duty it is to comply with the requisitions of this act, who
" shall neglect or refuse so to do, he, or they, shall forfeit and
" pay the sum of one hundred dollars for each and every
" month he, or they, shall delay a compliance; to be recovered
" by action of debt, in the name of the treasurer of the pro-
" per county, with costs, to be for the use and go towards sup-
" porting a school or schools, as the case may be, in said town;
" and if there should not be any in or near the place, the same
" is to remain in the treasury, until there be a school:

" *Provided*, That this act shall not be construed to compel
" any commissioners, agents, or other persons, to have any
" town plat recorded, which has been laid off where the whole
" of the lots sold have reverted back, or which may be again
" wholly vested in the original proprietors, before the first day
" of August next."

" This act to take effect and be in force from and after its
" passage."

We have only to remark, on this law, that it in no respect changes the common law regarding the dedication of land to public use for streets. The rights of the public, and the adjacent owner to the land dedicated and used as a public highway, are the same under this law as before.

It merely required the party who laid out an addition to a town or city, into blocks or lots, with streets and alleys intended for public use, to make and place on record, for preservation, authentic evidence of his acts and intentions, but it did not change the legal rights of the owner or the public.

V.

The act of February 27, 1833, in force four days after Kinzie's plat was filed for record (Laws 1833, p. 599), did

not change the legal rights of Kinzie, or those claiming under him, or the public, in block 54 and the land in front of it.

Those rights were fixed by the acts of the parties prior to that date, and the act only operated on plats afterwards made and recorded.

But if it is possible to hold that this law has any retrospective effect on the mutual rights of the parties, in the premises as they then existed, then there is an end of this case, because the fifth section of that act provides that plats, made and recorded according to its requirements, vest the *fee simple title* in the parcels of land dedicated to public use, *in the public*, and that would divest Kinzie of all title, right or interest east of the east line of block 54.

VI.

Ellen M. Woolcott, or those claiming under her, are entitled to the accretions which have been formed in front of block 54, as riparian proprietors.

This proposition is based upon the one stated above: that, by his deed to Mrs. Woolcott, Kinzie divested himself of all title to block 54, and the land in front of it to the water's edge.

"The question is well settled at common law, that the "person whose land is bounded by a stream of water, "which changes its course gradually, by alluvial forma- "tions, shall still hold by the same boundary, including "the accumulated soil. No other rule can be applied on "just principles. Every proprietor whose land is thus "bounded, is subject to loss, by the same means which may "add to his territory; and as he is without remedy for his

" loss, in this way, he cannot be held accountable for his " gain."

New Orleans vs. *The United States*, 10 Peters, 717.

" We think this, as a general rule, too well settled as " part of the American and English law of real property, " to be open to discussion."

Jones vs. *Soulard*, 24 Howard, 65.

This rule was also tacitly recognized in the cases of—

Jones, et al. vs. *Johnston*, 18 How., 150, and *Johnston* vs. *Jones, et al.*, 1 Black., 209,

as applicable to accretions formed on Lake Michigan, and at almost the precise place where the accretions in question have been formed.

Angell on Water-courses, secs. 53 to 57.

The same rule has been held applicable to the Detroit River.

Lorman vs. *Benson*, 8 Mich., 18.

To the same effect is the case of—

Seaman, et al. vs. *Smith*, 24 Ill., 523.

VII.

This right to the accretion is not divested by the intervention of a public highway, between the riparian estate and the water-course.

This was expressly decided in the well considered case of—

Morgan vs. *Livingston, et. al.*, 1 Louis. Cond. Rep., 451.

" If there be a public road between a field and the river, " still that which is made by alluvion accrues to the field." (Page 468).

This case was decided in 1819, and in 1841 the same

question came before the Supreme Court of Louisiana in the case of—

Municipality No. 2 vs. *The Orleans Cotton Press*, 18 Louis., 122;

and the court cited the language used in the former case, with express approval, as a correct statement of the law on this subject, and added further: "the intervention of a "public road between the front tract and the river does "not prevent accretion by alluvion, because the road and "the levee themselves belong to the front proprietors, sub-"ject to the public use"—page 236; and on pages 240 and 241, the court, in summing up the points intended to be decided, use this language:—"We are of opinion that "urban property fronting on a water-course is entitled to "alluvion, as well as rural estates; and that cities can ac-"quire *jure alluvionis* only in virtue of a title which would "constitute them front proprietors. That the defendants "must be considered as owning down to the road last laid "out, and that the intervention of the road does not in law "prevent their being regarded as front proprietors, and "entitled to any alluvion which now exists or may hereaf-"ter be formed between the levee and the water, subject "to the public use under the administration of the muni-"cipal authorities."

The language first quoted is almost accurately descriptive of the present case, and that cited last states clearly the rule which should be applied in such cases.

The principles established by these cases have been affirmed in the following later cases:

Mrs. Kennedy vs. *Municipality No.* 2, 10 Louisiana, 54, 1855;

Remey vs. *The 2d Municipality*, 11 Louisiana, 161, 1856;

Barrett vs. *New Orleans*, 13 Louis., 105, 1858.

All the foregoing cases are very much like this; and in the case last cited the court states thelaw to be as follows: "The accretions which are formed successively and imper- "ceptibly to any soil situate on a shore of a river or creek, "are called alluvions."

"The alluvion belongs to the owner of the soil situated "on the edge of the water, whether it be a river or creek, "and whether the same be navigable or not, who is bound "to leave public that portion of the bank which is required "by law for the public use."

We are satisfied to rest this point upon the reasoning and authority of these cases, so similar in their facts, and in the respective interests of the public and the adjoining owners to the present. While Kinzie owned the entire tract of land which he platted and laid out, he was a riparian proprietor, and as such entitled to all the accretions which should be formed upon it. Reason and authority both require that the streets shall be extended to the water front, *pari passu* with the growth of the accretion. This is especially true of all streets perpendicular to the water front; and in the present case, Kinzie evidently intended to dedicate Sand street to public use, as far as the land then there sufficed for that purpose. As the owner of block 54, he was a riparian proprietor along its whole east side; on the northern part of that side, because the water line was within the line of the block; and on the southern part of that side, because he owned the soil dedicated to public use, subject to the public easement. The fair and usual construction of the words of his deed to Mrs Woolcott, conveyed to her the title to block 54; and had a street of full width then been there, it would have carried the grant to the middle of that street; but before that point was reached, the granted premises touched the waters of the lake, and she

and her grantees, like Kinzie himself, owned to the water's edge, and thus became riparian owners, who were entitled to the accretions; and this upon the familiar principle, that as they are subject to loss by dereliction, they shall be compensated by the additions.

The right to accretion is one that belongs to the principal estate, not the person of the owner, nor to the proprietor of the easement. It does not belong to the latter, because he enjoys a benefit in another man's property or estate, and the loss or gain of that estate is not his, but the owner's.

"The right to future alluvion is inherent in the property "itself, and forms an essential attribute of it, resulting from "natural law in consequence of the local situation of the "land, just as much as the natural fruits of a tree belong "to the owner of the land; and that such an attempt to "transfer from the owner of the land to the city, the future "increase by alluvion, would be as legally absurd, as if "the legislature had declared, that after the incorporation "of the city, the fruits of all the orange trees within its "limits should belong thereafter to the city and not to the "owners of the orchards and gardens."

Municipality No. 2 vs. *Orleans Cotton Press*, 18 Louisiana, 240.

2 Washburn on Real Property, 451–3, sec. 3.

This disposes of any pretence that the right to these accretions remained in Kinzie after his conveyance to Mrs. Woolcott, as an inchoate right, liable to grow into a complete estate, and a right to every new grain of sand deposited there afterwards by the winds and waves of Lake Michigan. The case does not show that he ever asserted or supposed he had any interest left. Nine years after he had parted with his interest there, the accretion began to

form; it was not inventoried among the assets of his bankrupt estate, because it did not then exist; fifteen years after that, a "prowling assignee" (Lord Thurlow's language in a similar case,) asks for, and obtains, an order to sell the demanded premises, which had no existence, either in fact or law, until after Kinzie had been declared a bankrupt, and when he was no longer the owner of the principal estate, or any part of it, to which the right to accretions could attach. The law is believed to be well settled that the assignee takes no greater interest than the bankrupt had in the estate assigned to him, and we cannot well see how a right to accretions, which is an incident to the principal estate, can arise or exist in favor of one who had no such estate.

The only cases, which we are aware of, that are supposed to be in conflict with the Louisiana cases cited above, are those of *The City of Mobile* vs. *Eslava*, 16 Peters, 234, and *Smith* vs. *The St. Louis Public Schools*, 30 Mo., 290.

But in these cases the courts found the claimants not to be riparian proprietors, because an estate in fee in the streets in front of these lots was vested in the public, and, consequently, these cases do not conflict with those cited above, nor with any one where, as in the present case, the fee in the street is in the adjacent owner, and not in the public.

VIII.

Kinzie was declared a bankrupt in 1842, under the act of August 19, 1841. The petition and order for a sale of the demanded premises were made in 1857. We insist that if any interest or estate was left in Kinzie, after the conveyance to Mrs. Woolcott, that his assignee, and those claiming under him, are barred from maintaining this suit by the 8th section of the bankrupt act, which is as follows:

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"*And be it further enacted*, That the circuit court with-
"in and for the district where the decree of bankruptcy
"is passed, shall have concurrent jurisdiction with the district
"court of the same district of all suits, at law and in equity,
"which may and shall be brought by any assignee of the
"bankrupt, against any person, or persons, claiming an ad-
"verse interest, or by such person against such assignee,
"touching any property, or rights of property, of said bank-
"rupt transferable to, or vested in, such assignee; and no
"suit, at law or in equity, shall, in any case, be maintainable
"by or against such assignee, or by or against any person
"claiming an adverse interest touching the property, and
"rights of property aforesaid, in any court whatever, unless
"the same shall be brought within two years of the declara-
"tion and decree of bankruptcy, or after the cause of suit
"shall first have accrued."

This, like all limitation laws, was intended as a "statute "of repose," and to insure a prompt settlement of the bankrupt estate; and the public good requires that full effect be given to it by the courts.

It is a common practice, all over the country, for assignees to make sales of real and pretended interests in the bankrupt estate down to the present time, and for the purchasers to bring suits upon the titles thus acquired. It cannot be pretended that this is done for the benefit of the creditors. It is now more than twenty years since that law was enacted and repealed, and the interests of the creditors of the bankrupts have, in most cases, passed away, and these proceedings are instituted solely for speculating and litigious purposes. The act, in express terms, limits the right of the assignee to bring any suit, at law or in equity, against any person claiming an adverse interest touching the property, and rights of property, assigned to him, to two years after the declaration and decree of bankruptcy, or after the cause

of suit shall first have accrued. The present cause of action (if there is any) arose fifteen years before the petition for the sale of the demanded premises was filed. The assignee acquired title to them at the date of the assignment, or he never did; and if his right was barred, so was that of his grantee, for it was a limitation against the right to recover these premises, and he could transfer no greater right than he had.

This precise point was decided in the case of *Cleveland* vs. *Boerem et al.*, 24 New York, 613, and in the same case in the Supreme Court of New York, 27 Barbour, 252.

Kinzie had, at most, but a claim to the accretions which might be formed in front of block 54; as they were formed, they were claimed and held adversely to him, his assignee, and those claiming under them, by parties holding under his deed to Mrs. Woolcott. This makes a case within the letter and spirit of the terms of the 8th section, and, as the Supreme Court of New York, after two hearings, and the Court of Appeals, after one, have, on full consideration, held that limitation to be an effectual bar, both against the assignee and his grantees, we submit that decision should be followed, as tending to give effect to the law, and repose to the community.

SAML. W. FULLER,
For Def't in Error.

CHICAGO, February 11, 1864.

24 N.Y. 613

21 Missouri
21 Ill
23
26 Penn. 223